



FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

MAY 15 2007

Lawrence J. Tabas, Esq.
Obermayer, Rebmann, Maxwell & Hippel, LLP
1617 John F. Kennedy Boulevard
Philadelphia, PA 19103

Re: MUR 5788
Republican Federal Committee of
Pennsylvania and Patricia K. Poprik, in her
official capacity as treasurer

Dear Mr. Tabas:

On August 10, 2006, the Federal Election Commission ("Commission") notified your clients, Republican Federal Committee of Pennsylvania and Patricia K. Poprik, in her official capacity as treasurer ("RFCP"), of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On April 17, 2007, the Commission found, on the basis of the information in the complaint, and information provided by your clients, that there is no reason to believe RFCP violated 2 U.S.C. §§ 441a(a)(2)(A) and 434(b). Additionally, the Commission dismissed the allegation that your clients violated 2 U.S.C. § 441d. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which more fully explains the Commission's finding, is enclosed for your information.

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Mr. Lawrence J. Tabas, Esquire
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If you have any questions, please contact Roy Q. Luckett, the attorney assigned to this matter at (202) 694-1650.

Sincerely,

Thomasenia P. Duncan
General Counsel



BY: Ann Marie Terzaken
Acting Associate General Counsel
for Enforcement

Enclosure
Factual and Legal Analysis

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1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3
4 **RESPONDENTS:** Republican Federal Committee MUR 5788
5 of Pennsylvania and
6 Patricia K. Poprik,
7 in her official capacity as treasurer
8

9 **I. INTRODUCTION**

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11 The complaint in this matter alleges that a mailer disseminated by the Republican Federal
12 Committee of Pennsylvania ("RFCP") constitutes an unreported excessive in-kind contribution from
13 the RFCP to Rick Santorum and his campaign committee, Santorum 2006, in violation of 2 U.S.C.
14 §§ 441a(a)(2)(A) and 434(b). The complaint also alleges the mailer contained express advocacy and
15 did not comply with the disclaimer requirements in 11 C.F.R. § 110.11.

16 Based on the reasons outlined below, the Commission found no reason to believe that the
17 costs of the mailer constituted an unreported excessive in-kind contribution. Based on this
18 recommendation, the Commission did not reach the question of whether the volunteer materials
19 exemption applies with respect to this mailer. Although the volunteer materials exemption is
20 relevant to whether the mailer's disclaimer should have contained a statement that the
21 communication was authorized by the Santorum campaign, since it appears that the Santorum
22 campaign did authorize it, the Commission determined that it would not be a good use of its limited
23 resources to investigate whether the exemption was available. Therefore, the Commission also
24 exercised its prosecutorial discretion and dismissed the allegations relating to disclaimer violations
25 and closed the file.
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1 **II. FACTUAL AND LEGAL ANALYSIS**

2 **A. Facts**

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4 Rick Santorum and Bob Casey, Jr. were candidates for the U.S. Senate seat in Pennsylvania
5 in the 2006 general election. Prior to that election, the RFCP prepared and disseminated a mailer
6 that focuses on the immigration amnesty issue, contrasting Santorum's and Casey's positions on the
7 issue. The mailer includes a picture of, and a first-person statement from, Rick Santorum, headed
8 "An important message from Rick Santorum," in which he describes his position on immigration
9 amnesty. He states "Bobby Casey has joined Ted Kennedy and other liberals in supporting this
10 bill." He concludes by urging the reader to "log on to RickSantorum.com and sign a petition uniting
11 the thousands of Pennsylvanians who are expressing opposition to granting amnesty to those who
12 have entered our country illegally."

13 The first page of the mailer states in bold lettering "Bobby Casey has come out in support of
14 AMNESTY for those who have entered our county ILLEGALLY," and contains a picture of Casey
15 superimposed on a broken barbed wire fence. To the right of the Casey photograph, the mailer
16 includes the statement "Paid for by Republican Federal Committee of Pennsylvania-Victory 2006,"
17 which is displayed within a printed box. The RFCP's street address appears at the top of the page.

18 The remainder of the mailer discusses the purported immigration amnesty positions of
19 Santorum and Casey. In stating "Rick Santorum is going to do everything he can to keep this
20 terrible piece of legislation from ever becoming law," the RFCP directs the reader to "Join Rick
21 Santorum and **STOP** this legislation" (emphasis in the original) and "Go to RickSantorum.com and
22 sign the petition." In describing Casey's position, the mailer asks "What is Bobby Casey
23 THINKING?" It then states, "Casey has come out in support of AMNESTY for illegal

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immigrants,” and “we can only assume” that this action is “payback for all the liberal money that has been flowing into Casey’s Senate campaign.” The mailer provides a bullet-point description of the legislation, and also states, “You’d better be sitting down!” as it criticizes Casey’s support of the amnesty legislation.

The complaint alleges that the mailer was coordinated by the RFCP and Santorum because Santorum’s statement shows he was “materially involved” in the communication, meeting the conduct prong of the coordinated communications regulation at section 109.21. *See* 11 C.F.R. § 109.37(a)(3). The complaint also alleges that the regulation’s content prong was met because the mailer “includes a prominent advertisement for Santorum’s website,” and that website contains express advocacy.

The Respondents disagree that an in-kind contribution was made or received in connection with the mailer. They maintain that that the mailers are “volunteer touch pieces” because volunteers touched each one by ink-stamping the RFCP’s bulk permit indicia thereon. *See* 11 C.F.R. §§ 100.87(a) and 100.147 (exempting “volunteer materials” from the definitions of “contribution” and “expenditure”). Respondents also maintain that the mailer does not contain express advocacy, but “merely highlights Bob Casey’s position on a particular issue and directs voters concerned with Casey’s position to a website where they can register their concern.” RFCP Response at 2.

B. Analysis

1. Coordinated Communication

Under the Federal Election Campaign Act of 1971 as amended (“Act”), state and national party committees may each make coordinated expenditures in connection with the general election campaign of a Senate candidate affiliated with the party of up to the greater of \$20,000 or two cents

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1 multiplied by the voting age population of the state. 2 U.S.C. § 441a(d)(3)(A). In 2006, the
2 maximum limit of coordinated expenditures that RFCP, a state political party committee, and the
3 National Republican Senatorial Committee ("NRSC"), a national political party committee, could
4 each spend with respect to Santorum's general election campaign was \$761,500. *See* 2006
5 Coordinated Party Expenditure Limits, The (FEC) Record, 5-6 (March 2006). The state and
6 national party may assign some or all of their respective expenditure limits to each other. 11 C.F.R.
7 § 109.33(a). A party coordinated expenditure on behalf of a candidate in excess of the party's limit,
8 either its own or as augmented by assignment, constitutes an in-kind contribution to the candidate,
9 11 C.F.R. § 109.37(b), and as such is subject to the \$5,000 contribution limit at 2 U.S.C.
10 § 441a(a)(2)(A).¹

11 According to its FEC disclosure reports, on August 4, 2005, the RFCP contributed \$5,000
12 directly to the Santorum Committee for the general election. As for its coordinated party
13 expenditures, the RFCP authorized the NRSC to spend the maximum limit of \$761,500 on its
14 behalf. The NRSC disclosed coordinated expenditures in connection with Santorum's 2006 U.S.
15 Senate campaign totalling \$1,505,050. Collectively, the NRSC and the RFCP made coordinated
16 expenditures for the Santorum Committee below the maximum limit of \$1,523,000 (\$761,500 x 2)
17 by \$17,950 (\$1,523,000 - \$1,505,050). Thus, if the mailer does not constitute exempt activity, was
18 coordinated with the Santorum Committee, and cost in excess of \$17,950, the RFCP would have
19 made an excessive contribution to Santorum and the Santorum Committee. It appears from the

¹ This provision of the Act applies to multicandidate committees such as the RFCP. *See* 2 U.S.C. § 441a(a)(4)(A).

1 RFCP's disclosure reports that postage alone for the mailer cost in excess of \$35,000.

2 Section 109.37 of the Commission's regulations provide that a political party committee's
3 public communication is coordinated with a candidate, an authorized committee or agent thereof if
4 it meets a three-part test: (1) payment by a political party committee or its agent; (2) satisfaction of
5 one of three "content" standards; and (3) satisfaction of one of six "conduct" standards in 11 C.F.R.
6 § 109.21(d)(1) through (d)(6).²

7 In this matter, the first prong of the coordinated communication test is satisfied because the
8 RFCP, which paid for the mailer, is a political party committee. The third prong of this test, the
9 conduct standard, also appears to be satisfied because the inclusion of a first-person statement from
10 Santorum indicates that he or his campaign was "materially involved" with the communication, and
11 Respondents do not deny this characterization in their responses.³ Therefore, a reason to believe
12 finding that the mailer was a coordinated communication depends, at this stage, on an analysis of
13 whether the "content" prong of the coordinated communications test was met.

14 Of the three content standards, there has not been a claim, nor is there any evidence to
15 support, that the mailer disseminates or distributes, in whole or in part, any Santorum campaign
16 materials. *See* 11 C.F.R. § 109.37(a)(2)(i). The communication also fails to meet the content
17 standard in section 109.37(a)(2)(iii) because the available information indicates that it was

² The coordination allegation is properly analyzed under section 109.37, which applies to "party coordinated communications," rather than section 109 21, cited in the complaint.

³ The RFCP also does not maintain that Santorum's statement was a response to an inquiry about his position on legislative or policy issues. *See* 11 C.F.R. § 109.37(a)(3).

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disseminated more than 90 days before an election.⁴

That leaves section 109.37(a)(2)(ii)—“a public communication that expressly advocates the election or defeat of a clearly identified candidate for Federal office”—as the only remaining content standard. However, the complaint’s position that the express advocacy in this matter flows from the candidate’s website referenced in the mailer is misplaced. The public communication at issue here is the mailer itself, and it does not contain express advocacy.

Under the Commission’s regulations, a communication contains express advocacy when it uses phrases, campaign slogans or words, “which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s)....” *See* 11 C.F.R. § 100.22(a); *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976); *see also FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) (“*MCFL*”). The Commission’s regulations further define express advocacy as a communication, “when taken as a whole and with limited reference to external events, such as the proximity to the election,” that contains an “electoral portion” that is “unmistakable, unambiguous, and suggestive of only one meaning” and about which “reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidates, or encourages some other kind of action.” 11 C.F.R. § 100.22(b).

⁴ The Commission recently revised its coordination regulations. *See* Explanation & Justification, *Coordinated Communications*, 71 Fed. Reg. 33198 (June. 8, 2006) (“Revised Coordination E&J”). In the case of communications that refer to Senate candidates, pursuant to the revised regulations at section 109.37(a)(2)(iii)(A), the period begins 90 days before each of the primary and the general elections and runs through the date of each election, respectfully. Prior to the revised coordination regulations, a public communication that referred to a clearly identified Federal candidate that was disseminated within 120 days before an election, and that was directed to voters in the jurisdiction of the clearly identified candidate, met the “content” standard for a coordinated communication. The revised regulations became effective on July 10, 2006. The complaint in this matter was dated July 31, 2006, indicating that the communication was publicly distributed before July 31, 2006, but likely after July 10, 2006. Given that Pennsylvania’s primary election had already taken place on May 16, 2006, the next election was the November 7, 2006 general election. Since that election was more than 90 days after the July 31, 2006 complaint, it appears that the mailer was distributed outside of the time period specified in 11 C.F.R. § 109.37(a)(2)(iii).

1 The mailer in question does not contain phrases, slogans or words that explicitly or “in
2 effect” urge the election of Rick Santorum or the defeat of Bob Casey. *See* 11 C.F.R. § 100.22(a).
3 Rather, it prominently directs readers to “Join Rick Santorum and STOP this legislation” (emphasis
4 in the original) and “Go to RickSantorum.com and sign the petition.” Despite the fact that the
5 communication clearly identifies two candidates for Federal election and a reference to “Casey’s
6 Senate campaign,” the overwhelming focus of the communication is on the immigration issue and
7 Santorum’s and Casey’s contrasting positions on that issue; it does not tell readers for whom to
8 vote. While the communication conveys RFCP’s apparent preference for Santorum’s position on
9 the amnesty immigration issue, that alone does not constitute express advocacy.

10 What is critical in this matter is that reasonable minds could differ as to whether the mailer
11 encourages electoral, or some other action. *See* 11 C.F.R. § 100.22(b). At the time that this mailer
12 was disseminated by the RFCP, the legislation in issue, S.2611, had passed in the Senate and a
13 companion bill had recently been introduced in the House of Representatives. As such, it was still a
14 live legislative issue that could have been stopped. Additionally, the immigration amnesty issue
15 was one that had garnered both bipartisan support and opposition, especially given that Senators
16 McCain and Kennedy were among the co-sponsors of S.611. Against this backdrop, readers could
17 reasonably view the communication as encouraging them to advance Santorum’s and the RFCP’s
18 agenda of stopping immigration amnesty legislation, not encouraging them to vote for or against one
19 of the candidates. Indeed, it is possible that readers that would not vote for Santorum would still
20 agree with him and the RFCP on this issue and sign the petition.

21 Since the mailer does not meet the content prong of the coordinated communications
22 regulation, a coordinated communication did not occur. Given this conclusion, the Commission

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1 need not reach the issue of the applicability of the volunteer materials exemption in this context,
2 because, in the absence of coordination, there was no “contribution” to exempt.

3 Therefore, there is no reason to believe that the Republican Federal Committee of
4 Pennsylvania and Patricia K. Poprik, in her official capacity as treasurer, violated 2 U.S.C.
5 §§ 441a(a)(2)(A) and 434(b) by making an excessive in-kind contribution in the form of a
6 coordinated communication to Rick Santorum and Santorum 2006 and Gregg R. Melinson, in his
7 official capacity as treasurer, and failing to report it.

8 **2. Disclaimer**

9 The complaint also alleges that the mailer’s disclaimer fails to include the RFCP’s street
10 address, telephone number, or website address, and an authorized/not authorized statement.⁵ See
11 11 C.F.R. § 110.11. Of these items, only the authorization statement would have been required if
12 the Santorum campaign authorized the mailer. Compare sections 110.11(b)(2) and (3). If, however,
13 the mailer qualified for the volunteer materials exemption, it would not need such a statement. See
14 11 C.F.R. § 110.11(e). Thus, the availability of the volunteer material exemption is relevant to a
15 potential disclaimer violation. We note, however, that for the exemption to apply, the materials
16 must be “distributed by volunteers and not by commercial or for-profit organizations,” 11 C.F.R.
17 §§ 100.87(d), 100.147(d). Since the RFCP has not provided any information concerning how or by

⁵ The complaint appears to allege that the RFCP, as a non-authorized committee of Santorum or his campaign committee, failed to include a statement attesting to its non-authorized status in the disclaimer. However, this approach misconstrues 11 C.F.R. § 110.11(b)(3), because that regulation focuses on whether the candidate or authorized committee of a candidate authorizes the communication, not whether the entity paying for the communication is the candidate’s authorized committee. Therefore, we analyze the issue consistent with the regulation.

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1 whom the mailers were delivered for mailing, an investigation would be needed to discover this
2 information.

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5 We believe that instituting an investigation simply to determine whether the mailer required
6 an authorized/not authorized statement would not be a prudent use of limited resources, especially
7 given that the mailer is from Santorum's party and contains a message written by him in the first
8 person. Under these circumstances, it seems highly likely that Santorum or his committee
9 authorized the communication.

10 Therefore, the Commission, as a matter of prosecutorial discretion, has decided to dismiss
11 the allegation that the Republican Federal Committee of Pennsylvania and Patricia K. Poprik, in her
12 official capacity as treasurer, violated 2 U.S.C. § 441d by failing to include an adequate disclaimer.
13 *See Heckler v. Cheney*, 470 U.S. 831 (1985).⁶

⁶ The complaint also contends that the disclaimer, with its black print on a gray background, is not printed with a reasonable degree of color contrast. See 2 U.S.C. § 441d(c)(3), 11 C.F.R. § 110.11(b)(3). The Respondents claim that the disclaimer was printed in sufficient contrast to be clearly readable. We agree with the Respondents.

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